UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/045,149	01/15/2002	Edgar Circenis	10016873-1	8859

7590   07/28/2008

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WU, RUTAO

ART UNIT	PAPER NUMBER
3628	

MAIL DATE	DELIVERY MODE
07/28/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

PTOL-90A (Rev. 04/07)

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte EDGAR CIRCENIS,
GLENN MILLER, and
ROBERT C. LEHR

_____

Appeal 2008-0223
Application 10/045,149
Technology Center 3600

_____

Decided: July 28, 2008

_____

Before MURRIEL E. CRAWFORD, HUBERT C. LORIN, and
JOSEPH A. FISCHETTI, *Administrative Patent Judges.*

LORIN, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Edgar Circenis, et al. (Appellants) seek our review under 35 U.S.C.

§ 134 of the final rejection of claims 33-65. We have jurisdiction under

35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM-IN-PART and add a new ground of rejection.[1]

THE INVENTION

The invention relates to a pay-per-use (PPU) of software. The claimed invention is directed to a PPU approach that allows for flexible and dynamic pricing. The invention includes the use of a software metering agent (element 20, Fig. 2) and/or a metric gathering tool (element 25) "for performing the collection and monitoring function" (Specification 3:9).

Claims 33, 52, and 59, reproduced below, are representative of the subject matter on appeal.

> 33. A software pay-per-use (PPU) system comprising:
>
> a first computer having one or more PPU software products;
>
> a metrics gathering tool associated with each of the one or more PPU software products, wherein each metrics gathering tool monitors and measures usage data for its associated one or more PPU software products;
>
> a software metering agent residing on the first computer, wherein the software metering agent collects the measured usage data from each metrics gathering tool associated with the

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[1] Our decision will make reference to Appellants' Appeal Brief ("App. Br.," filed Nov. 8, 2006), the Examiner's Answer ("Answer," mailed Feb. 21, 2007) and the Reply Brief ("Reply Br.," filed Apr. 23, 2007).

one or more PPU software products and collects usage data for all of the one or more PPU software products registered with the software metering agent on the first computer;

a utility metering appliance connected to a plurality of computers, including the first computer, through a network, wherein the utility metering appliance receives the collected usage data from the software metering agent residing on the first computer and other software metering agents residing on other computers connected to the utility metering appliance through the network; and

a usage collection and billing system, wherein the usage collection and billing system periodically receives the collected usage data from the utility metering appliance and processes the collected usage data to generate billing information for PPU software products on the plurality of computers connected to the utility metering appliance through the network.

52.   A computer implemented method for generating a bill for using a pay-per-use (PPU) software product, the method comprising:

measuring usage data associated with one or more PPU software products using a metrics gathering tool at a first computer having one or more PPU software products, wherein one metrics gathering tool is associated with each of the one or more PPU software products;

collecting the measured usage data from each metrics gathering tool associated with each of the one or more PPU software products using a software metering agent, wherein the software metering agent collects usage data for all of the one or more PPU software products registered with the software metering agent on the first computer;

receiving the collected usage data from the software metering agent residing on the first computer and from a plurality of other software metering agents residing on a plurality of computers, wherein the collected usage data is collected at a utility metering appliance connected to the plurality of computers, including the first computer, through a network;

processing the collected usage data from each metrics gathering tool associated with each of the one or more PPU software products on the first computer received from the utility metering appliance; and

generating the bill for using the one or more PPU software products on the first computer based on the processed collected usage data from the first computer.

59.   A computer readable storage medium containing instructions for generating a bill for using a pay-per-use (PPU) software product, by:

measuring usage data associated with one or more PPU software products using a metrics gathering tool at a first computer having one or more PPU software products, wherein one metrics gathering tool is associated with each of the one or more PPU software products;

collecting the measured usage data from each metrics gathering tool associated with each of the one or more PPU software products using a software metering agent, wherein the software metering agent collects usage data for all of the one or more PPU software products registered with the software metering agent on the first computer;

receiving the collected usage data from the software metering agent residing on the first computer and from a plurality of other software metering agents residing on a plurality of computers, wherein the collected usage data is collected at a utility metering appliance connected to the plurality of computers, including the first computer, through a network;

processing the collected usage data from each metrics gathering tool associated with each of the one or more PPU software products on the first computer received from the utility metering appliance; and

generating the bill for using the one or more PPU software products on the first computer based on the processed collected usage data from the first computer.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Halliday   US 2002/0083003 A1   Jun. 27, 2002

The following rejections are before us for review:

1. Claims 33-46 and 48-65 are rejected under §102(e) as being anticipated by Halliday.

2. Claim 47 is rejected under §103 as unpatentable over Halliday.

ISSUES

The first issue before us is whether the Appellants have shown that the Examiner erred in rejecting claims 33-46 and 48-65 as being anticipated by Halliday.

These issues turn on whether Halliday describes the claimed metering agent and gathering tool.

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1.   The claimed invention describes a process and system for metering software application usage comprising a metrics gathering tool, a software metering agent, and a utility metering appliance.

2.   The metrics gathering tool is associated with at least one PPU software product and monitors and measures usage data of the product. See claim 33.

3.   The software metering agent resides on a computer and collects the measured usage. See claim 33.

4.   The utility metering appliance is connected to as plurality of computers, including the computer with the software metering agent, and receives the collected measured usage. Claim 33.

5.   Accordingly, the claimed system comprises software comprising
(a) a metrics gathering tool for measuring application usage and (b)
a metering agent for collecting application usage, and (c) a utility
metering appliance for receiving the collected the usage data.

6.   Halliday describes a process and system for metering software
application usage comprising software comprising a metering
means and a metering monitor, and a metering server.

7.   According to Halliday, "[i]n accordance with the [Halliday]
invention a system is provided whereby a user may execute any
number of software applications by downloading or otherwise
obtaining a software package from one or a plurality of software
proprietors for use on his client computer. ... All software usage is
automatically controlled and metered on the client system and the
metered usage is reported to a metering server located in a host site
(or a plurality of sites) where the software usage is accounted for
and charged." [0053]

8.   Halliday defines its metering sever as follows:

[0051] Metering server: A computer program connected
to a set of metering monitors via a communications link.
The metering server is responsible for collating tool
usage information and applying this collated information
in the form of credit deductions from client user' credit
pool.

9.   Halliday describes operation of its system as comprising
downloading, to a computer, a software package which may
include "an application library having metering means for
developing and communicating usage information to an also
included metering monitor." See [0056], reproduced below:

> [0056] The user will then load from a data storage
> medium (such as a magnetic disk or tape, optical disk
> including CD ROM and DVD electronic storage media
> including ROMcard and Ram-card, or any other suitable
> data storage means), or download from a proprietor's
> website to his local computer, one or more specially
> configured software packages. These packages may
> include, in addition to the client application, an
> application library having metering means for developing
> and communicating usage information to an also
> included metering monitor. An included login tool
> provides an interactive front end to the meeting monitor
> and enables the user to logon to the remote metering
> system. The logon process will map the local user on the
> client computer to an account held in the remote
> database, and such account will be charged as usage of an
> application is accumulated. Once logged on, any
> applications running as a local user will be charged to the
> remote account. The metering monitor software on the
> client computer is responsible for accepting usage
> information from a client application and forwarding that
> information to the central billing server. Further, the
> metering monitor is operative to track applications exits
> and to close charging sessions for applications that exits
> and to close charging sessions for applications that exit
> spuriously. In an alternative embodiment of the present
> invention, the metering monitor may also act as a proxy

server, accumulating metering information and forwarding the information as a batch to the central server at periodic intervals set by the server. This is intended to minimize the amount of time the client computer needs to be in contact with its metering server.

10. Halliday's "metering monitor software on the client computer is responsible for accepting usage information from a client application and forwarding that information to the central billing server." [0056]

11. Halliday defines its metering monitor as follows:

> [0052] Metering monitor: A computer program that receives and batches tool usage information from running tools for secure firewall-transparent communication to a metering server. The metering monitor relays commands and information to running applications. The metering monitor also monitors the state of tools and reports failures and completions to the metering server

12. Accordingly, Halliday describes three elements: software on a client computer comprising (a) a metering means for communicating application usage and (b) a metering monitor for accepting application usage, and (c) a metering server for collecting the usage data for further processing.

13. The various elements of the claimed and Halliday systems and their functions are summarized in the following table.

Claimed Invention	Function	Halliday	function

metrics gathering tool	monitors and measures usage	metering means	communicates usage
metering agent	collects measured usage	metering monitor	accepts usage
utility metering appliance	receives collected usage data	metering server	collects usage

PRINCIPLES OF LAW

Definiteness

The test for compliance is whether the claims set out and circumscribe a particular area with a reasonable degree of precision and particularity when read in light of the application disclosure as they would be interpreted by one of ordinary skill in the art. *In re Moore*, 439 F.2d 1232, 1235 (CCPA 1971).

Anticipation

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros., Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

Obviousness

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such

that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.") The Court in *Graham* further noted that evidence of secondary considerations "might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented." 383 U.S. at 18.

ANALYSIS

The rejection of claims 33-46 and 48-65 under §102(e) as being anticipated by Halliday.

The Appellants argued claims 33-46 and 48-65 according to the following groups:

- Claims 33-36 and 48-51 in discussing the claimed software metering agent (App. Br. 10-11);
- Claims 52-65 in discussing the claimed collecting the measured usage step (App. Br. 11-12);

- Claims 33-46 and 48-51 in discussing the claimed metrics gathering tool (App. Br. 12);

- Claims 52-65 in discussing the measuring usage data step (App. Br. 13-14); and

- Claim 47 (App. Br. 13-14).

With respect to each of the first four groupings, we select claims 33, 52, 33, and 52 as representative claims, and the remaining claims 34-36 and 48-51, 53-65, 34-36 and 48-51, and 53-65 stand or fall with claims 33 (see *supra*), 52 (see *supra*), 33, and 52, respectively. 37 C.F.R. § 41.37(c)(1)(vii) (2007). The Reply Brief further addresses claims 34, 38, 45 and 46. Reply Br. 4-6. We will treat these arguments separately.

Regarding the rejection of claims 33-36 and 48-51 with respect to the claimed software metering agent

The Appellants argued that Halliday does not anticipate the claimed invention because it does not inherently or explicitly describe the claimed metering agent. App. Br. 10.

There is no dispute that Halliday describes a "metering monitor". FF 11. The issue is whether Halliday's metering monitor meets the claimed metering agent. The claimed metering agent reads as follows:

> a software metering agent residing on the first computer,
> wherein the software metering agent collects the measured
> usage data from each metrics gathering tool associated with the
> one or more PPU software products and collects usage data for

all of the one or more PPU software products registered with
the software metering agent on the first computer;

Claim 33.

The Examiner maintained that Halliday's metering monitor equates
with the claimed metering agent. Answer 13. The Examiner relied upon the
disclosure at [0056] of Halliday as evidence that Halliday describes the
claimed metering agent. Answer 3.

The Appellants disagreed that [0056] of Halliday describes the
claimed metering agent. The Appellants argued:

> Paragraph [0056] does not describe that the metering
> monitor "collects the measured usage data from each
> metrics gathering tool associated with the one or more
> PPU software products and collects usage data for all of
> the one or more PPU software products."(emphasis
> added). Indeed, as described in paragraph [0056], a
> metering monitor is included in each specially configured
> software package. Therefore, the metering monitor only
> accumulates metering information for the client
> application in the software package, not all of the PPU
> software products and not from each metrics gathering
> tool. Furthermore, it is also worth noting that *Halliday*
> does not describe any software products "registered" with
> the claimed software metering agent. Therefore, it cannot
> meet the feature of "PPU software products registered
> with the software metering agent on the first computer."
> (emphasis added). Consequently, *Halliday* does not
> inherently or explicitly describe the claimed software
> metering agent. [Emphasis original.]

App. Br. 11.

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Accordingly, the Appellants argued that [0056] of Halliday does not describe the claimed metering agent for two reasons: (1) while [0056] of Halliday describes a metering monitor for a particular software package, it does not describe monitoring *all* PPU products from *each* gathering tool associated with the products and (2) it does not describe the metering agent registering a software package.

Regarding reason (1), the Examiner responded by arguing that Halliday "discloses the function of the metering monitor by stating that the metering monitor is a computer program that receives and batches tool usage information from running tools for secure firewall-transparent communication to a metering server [0052] and in one embodiment of the invention deployed on a client computer. [0068] From the fact that the metering monitor receives and batches tool usage information from multiple running tools and monitors the client applications on the client computer, Halliday teaches "collects the measured usage data from each metrics gathering tool associated with the one or more PPU software products and collects usage data for all of the one or more PPU software products" [claim 33]." Answer 13.

We have carefully considered the arguments and find that, on balance, the facts support the Examiner's position. The Appellants do not appear to dispute the Examiner's interpretation of Halliday's metering monitor as a means for collecting usage data in the manner claimed for the instant metering agent. Rather, the Appellants argue that Halliday does not describe

monitoring *all* PPU products from *each* gathering tool associated with the products. In other words, the Appellants appear to be contending that Halliday does not describe a metrics gathering tool (i.e., Halliday's metering means) associated with each of the products from which the metering agent (i.e., Halliday's metering monitor) collects usage data. However, the scope of the claim is such that it covers a metering agent collecting data from a gathering tool associated with a single application. Halliday describes a method involving an application library having a metering monitor that accepts usage data communicated to it by a metering means associated with that single application. Halliday describes a metering monitor (i.e., a metering agent) associated with a single application having a metering means (i.e., a metrics gathering tool) for collecting usage data from the metering means associated with that application. Accordingly, Halliday describes monitoring a PPU product from a metrics gathering tool associated with a product as claimed.

Given the scope of claim 33, the claimed metering agent would appear to read on Halliday's metering monitor. In light of the breadth of the claim, the Appellants' argument is not persuasive as to error in the rejection.

Regarding reason (2), the Examiner (Answer 13) responded by arguing as follows:

> The applicant also argues that Halliday does not describe
> any software product registered with the software
> metering agent. However, Halliday discloses that a user

downloads to his local computer one or more specially
configured software packages. These packages may
include, in addition to the client application, an
application library having metering means for developing
and communicating usage information to an also
included metering monitor. [0056] Since the downloaded
software packages include the client application and a
metering monitor then the application is registered with
the metering monitor so that the monitor could monitor
the application usage.

Answer 13.

We have carefully considered the arguments and find that, on balance,
the facts support the Examiner's position.

The issue turns on the definition to be given the claim term
"registering." In that regard, the Appellants do not point us to any definition
in the Specification, nor do we find any, such that the claim term
"registering" is to be accorded a meaning different from its ordinary and
customary meaning. The ordinary meaning of registering in the context of
the claimed invention is to "enter in or as in a record or list; enroll or record
officially". (*See Webster's New World Dictionary* 997 (3rd Ed. 1988.)(Entry
1 for verb transitive "register.")

Given this meaning for the term "registering," we are unable to find
any difference between how Halliday operates its method and that claimed.
As the Examiner has argued, once the Halliday application is downloaded
and the metering begins, the application is necessarily "registered." The
Halliday system is directed to metering the usage of a downloaded software

package. To obtain usage data for a downloaded software package. The Halliday system must necessarily begin with a step of enrolling or "registering" the software package to be metered before beginning the metering process.

In light of the ordinary meaning of "registering," the Appellants' argument is not persuasive as to error in the rejection.

In the Reply Brief, the Appellants also argued that Halliday does not describe the claim 33 limitation whereby the metering appliance "receives the collected usage data from the software metering agents residing on other computers connected to the utility metering appliance." Reply Br. 2. According to Appellants, the Examiner is relying on a single element, i.e., Halliday's metering server, to meet two claimed elements – the "utility metering appliance" and the "usage collection and billing system." Reply Br. 2.

The difficulty with the Appellants' argument is that it fails to respond to the Examiner's interpretation of Halliday's metering monitor as an instrument for collecting usage data. Based on that interpretation, Halliday's metering server acts to receive the data the metering monitor collected. Accordingly, the Examiner did not represent Halliday's metering server as the only element in Halliday's system to collect data. If Halliday's metering monitor collects data, which has not been disputed, then Halliday expressly describes a metering appliance (i.e., Halliday's metering server) that "receives the collected usage data from the software metering agents

residing on other computers connected to the utility metering appliance" (claim 33).

Another difficulty with the argument is that it presumes claim 33 describes a structure that divides the "utility metering appliance" from the "usage collection and billing system." However, claim 33 calls for a "utility metering appliance" and "usage collection and billing system ... [which] receives the collected usage data from the utility metering appliance" without limiting their arrangement to each other. The claim is broad enough to allow a single system to perform both the usage collection and billing functions. In that regard, Halliday describes an embodiment where the metering server may be a part of a billing site (see element 9C of Fig. 9, discussed at [0077]). The claimed "utility metering appliance" and "usage collection and billing system" would read on such a site.

Accordingly, this argument is not persuasive as to error in the rejection.

Regarding the rejection of claims 52-65 with respect to the claimed collecting the measured usage step

For the same reasons the Appellants challenged the rejection of claims 33-36 and 48-51 with respect to the claimed software metering agent, the Appellants challenged the rejection of claim 52 with respect to the claimed step of collecting measured usage data using a software metering agent. App. Br. 11-12.

The step of step of collecting measured usage data using a software metering agent corresponds to the software metering agent described in claim 33. Because Appellants' arguments did not persuade us that Halliday fails to inherently or expressly describe the claim 33 software metering agent, we are equally unpersuaded that Halliday fails to inherently or expressly describe the claim 52 step of collecting measured usage data using a software metering agent.

Regarding the rejection of claims 33-46 and 48-51 with respect to the claimed metrics gathering tool

The Appellants also challenged the rejection of claims 33-46 and 48-51 on the grounds that Halliday fails to describe the claimed metrics gathering tool.

Claim 33 describes the metrics gathering tool as follows:

> a metrics gathering tool associated with each of the one
> or more PPU software products, wherein each metrics
> gathering tool monitors and measures usage data for its
> associated one or more PPU software products;

According to the Appellants (App. Br. 12-13), Halliday does not describe one gathering tool associated with each PPU software. This argument is unpersuasive for the reason we discussed earlier in this decision. The Appellants appear to be contending that Halliday does not describe a gathering tool associated with each of the products from which the metering agent collects usage data. However, the scope of the claim is such that it

covers a metering agent collecting data from a gathering tool associated with a single application. The claimed gathering tool functions to monitor and measure usage data of the product. FF2.

Halliday describes a metering method involving an application library having a metering monitor that accepts usage data communicated to it by a metering means. Halliday encompasses a method involving a single application. Accordingly, Halliday describes a metering means (i.e., a metrics gathering tool as claimed) that gathers data to be communicated to a metering monitor that collects the data (i.e., a metering agent as claimed) associated with a single application. Thus, the claimed metrics gathering tool appears to read on Halliday's metering means.

Accordingly, we are not persuaded by the Appellants' argument as to error in the rejection.

Regarding the rejection of claims 52-65 with respect to the claimed measuring usage data step

For the same reasons the Appellants challenged the rejection of claims 33-36 and 48-51 with respect to the claimed gathering tool, the Appellants challenged the rejection of claim 52 with respect to the claimed step of measuring usage data using a metrics gathering tool. App. Br. 13.

The step of measuring usage data using a metrics gathering tool corresponds to the metrics gathering tool described in claim 33. Because Appellants' arguments did not persuade us that Halliday fails to inherently

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or expressly describe the claim 33 metrics gathering tool, we are equally unpersuaded that Halliday fails to inherently or expressly describe the claim 52 step of measuring usage data using a metrics gathering tool.

The rejection of claim 47 under §103 as unpatentable over Halliday.

The Appellants rely on the same arguments made against the rejection of claim 33 (on which claim 47 depends). App. Br. 13-14. They are unpersuasive for the same reasons discussed above with respect to the rejection of claim 33.

Arguments made in the Reply Brief

Claims 34, 35, 53, 54, 60, and 61

The Appellants argued that claim 34 calls for a registry that Halliday does not describe. Reply Br. 4. The Examiner relied on [0056] and [0068] of Halliday to find that Halliday describes this claimed limitation. Answer 4. Notwithstanding the Examiner's finding, we are unable to find a registry described in the disclosures indicated. Accordingly, there is no identity. We will therefore not sustain the rejection of those claims which further describe a registry: i.e., claims 34, 35, 53, 54, 60, and 61.

Claim 38

The Appellants argued that Halliday does not describe "the utility metering appliance is a software program residing on each of the plurality of computers." Reply Br. 5. The Examiner relied on [0051] and [0052] of

Halliday to find that Halliday's metering server meets this claimed

limitation. Answer 5. We agree. [0051] of Halliday describes the metering

server as a computer program "connected to a set of metering monitors." FF

8. [0052] of Halliday describes communicating usage and reporting failures

and completions to a metering server.

> [0052] Metering monitor: A computer program that
> receives and batches tool usage information from running
> tools for secure firewall-transparent communication to a
> metering server. The metering monitor relays commands
> and information to running applications. The metering
> monitor also monitors the state of tools and reports
> failures and completions to the metering server

FF 11. However, neither disclosure expressly or inherently describes the

"utility metering appliance is a software program *residing on each of the*

plurality of computers" (claim 38). Accordingly, there is no identity.

Therefore, the rejection of claim 38 will be reversed.

Claim 45

The Appellants argued that the claimed usage data includes a number

of input/output (I/O) transactions processed in a given period of time and

that this is not described. The Examiner relied on [0064] of Halliday to find

that Halliday describes this claimed limitation. Answer 6. Notwithstanding

the Examiner's finding, we do not find the claimed usage data described in

the indicated disclosures. Accordingly, there is no identity. Therefore, the

rejection of claim 45 will not be sustained.

Claim 46

The Appellants argued that the claimed data is based on items listed in claim 46 that is not described in Halliday. The Examiner relied on [0064]. Answer 6. Notwithstanding the Examiner's finding, we do not find any of the items on which the claimed data is based described in the indicated disclosures. Accordingly, there is no identity. Therefore, the rejection of claim 46 will not be sustained.

NEW GROUND OF REJECTION

Claim 35 currently depends on claim 33 and states: "The system of claim 33, wherein the software metering agent reads the pathname in the registry to access the associated metrics gathering tool and collect the measured usage data." Claim 33 makes no mention of a pathname or a registry. These limitations have no antecedent basis in claim 33. Claim 35 has been drafted to further define a pathname and registry that claim 33 does not describe. Accordingly, claim 35 is indefinite and, as a result, does not comply with the second paragraph of 35 U.S.C. § 112.

CONCLUSIONS OF LAW

We conclude:

The rejection of claims 33, 36, 37, 39-44, 48-52, 55-59, 62-65 under 35 USC §102(e) as being anticipated by Halliday is affirmed.

The rejection of claims 34, 35, 38, 45, 46, 53, 54, 60, and 61 under

35 USC §102(e) as being anticipated by Halliday is reversed.

The rejection of claim 47 under 35 USC §103 over Halliday is affirmed.

A new ground of rejection has been applied against claim 35 under 35 USC §112, second paragraph.

DECISION

The decision of the Examiner finally rejecting claims 33-65 is affirmed-in-part.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

> • (1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner . . . .

> • (2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record . . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)

vsh

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